

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 15434 of the President and Directors of Georgetown College, pursuant to 11 DCMR 3108.1, for a special exception under Section 211 for further processing under an approved Campus Plan to allow an addition to a power plant in an R-3 District at premises 37th and O Streets, N.W. (Square 1321, Lot 817).

HEARING DATES: March 13 and 14, 1991

DECISION DATES: April 3 and 24, 1991

DISPOSITION: The Board **GRANTED** the application by a vote of 4-0 (Charles R. Norris, Paula L. Jewell, Carrie L. Thornhill and Sheri M. Pruitt to grant).

FINAL DATE OF ORDER: July 31, 1991

MODIFICATION ORDER

The Board granted the application subject to seven conditions by its order dated July 31, 1991. On September 25, 1992, counsel for the applicant filed a timely motion for a modification of the previously approved plans. The Board found that the motion was timely filed since the running of the six-month time period for applying for modification is tolled by the filing and pendency of a petition for judicial review as set forth in a memorandum from the D.C. Corporation Counsel to the Director, D.C. Department of Housing and Community Development, dated December 14, 1977. The applicant's motion requested that the order be amended to substitute the modified plans which reflect minor revisions to the project made during the development of working drawings, as well as changes to the plans requested during historic preservation review of the project. Specifically, the following changes are included in the revised plans:

- Changes to the switchyard area which include a reduction in its size, a slight relocation, and the substitution of a screening wall for the chain link fence on the west side.
- The elimination of the meter house because the equipment has now been placed inside the cogeneration building.
- The extension of the screen wall on the plant roof to shield rooftop equipment from view.
- Relocation of the underground fuel oil storage tanks for technical reasons and to avoid rock conditions.

The basis for the requested modification of plans was the disapproval of the permit application by the Zoning Administrator on the grounds that the plans were inconsistent with the documents approved by the Board and that the changes were not within the flexibility provided in the Board's order. The applicant's motion requests the Board to approve the modified plans and clearly state the flexibility provided to the applicant to make further changes.

On October 5, 1992, counsel for parties in opposition to the application filed a response to the motion opposing the proposed Modification of Plans. Counsel for the opposition argued that the motion for modification was filed in an untimely manner; that there has been no good cause shown by the applicant to justify a waiver of the six-month filing requirement; that the requested modification of plans is not minor in nature and changes the material facts relied upon by the Board in approving the application; that additional zoning relief would be required; and, that service of the modification on parties to the application was not properly performed.

By affidavit filed on October 7, 1992, counsel for the applicant responded to the issues raised by the opposition regarding the adequacy of service on the parties to the application. The Board is satisfied that the service was adequate in accordance with the provisions of 11 DCMR 3305. In addition, based on the memorandum from the D.C. Corporation Counsel to the Director of the D.C. Department of Housing and Community Development, dated December 14, 1977, regarding the tolling of the time limit for application for building permits pursuant to BZA authority, the Board concludes that the motion was timely filed.

Upon consideration of the motion, the opposition thereto, the record in the case and its final order, the Board concludes that the proposed modifications are minor in nature and do not alter the overall project as approved by the Board. No additional zoning relief is required. The material facts relied upon by the Board in approving the application are still relevant.

In its order dated July 31, 1991, the Board approved the application with the express condition that the applicant has the flexibility to make design changes during the historic preservation review process as well as the flexibility to modify the location of interior equipment. The Board is of the opinion that the changes which are the subject of this modification request fall within the flexibility previously given by the Board in its initial order. To make it absolutely clear that the applicant has the flexibility to make minor changes to the project as it proceeds through the historic preservation review phase and the permitting phase, it is hereby **ORDERED** that the **MODIFICATION of PLANS is APPROVED, SUBJECT**

to the following **CONDITION** which is intended to clarify and supersede Condition No. 1 of the Board's original Order:

Construction shall be in accordance with the plans marked as Exhibit No. 182-D of the record, dated September 23, 1992. The applicant shall have the flexibility, without further Board review, to make design changes necessary to satisfy final historic preservation review; the flexibility to modify the location of all equipment within the plant and switchyard and any underground facilities; and, the ability to further reduce the square footage of the project. The maximum square footage of the total project, including the existing facility, shall remain at 82,605 square feet, which includes a maximum of 40,668 square feet of total new construction as shown on Sheets 1 and 3 of the September 23, 1992 plans and as provided in the Board's original approval.

In all other respects, the order of the Board dated July 31, 1991 shall remain in full force and effect.

On October 16, 1992 subsequent to the Board's decision to approve the modification of plans and prior to the issuance of its written order, Dianne L. Sawaya, Single Member District Commissioner for ANC 3B-06 and a party in opposition to the case, filed a petition to stay the issuance of the modification order. The bases for the request to stay are summarized as follows:

- a. Ms. Sawaya was not properly served with a copy of the applicant's motion for modification of plans as required by the Board's Rules.
- b. Based on improper service, Ms. Sawaya did not have an ample opportunity to file comments so that the interests of the citizens she represents could be submitted to the Board prior to its decision. The rights of the citizens were prejudiced by the Board's action under these circumstances.
- c. The affidavit filed by the applicant claiming service on Ms. Sawaya consists in large part of inadmissible hearsay from deliverers who were not under oath and did not provide a copy of their logs indicating service upon her. Ms. Sawaya was further not served with a copy of that affidavit.

By letter dated October 22, 1992, counsel for the applicant opposed the request for stay based on the following:

- a. The request failed to meet any requirements of the Board's Rules of Practice and Procedure for the filing of post-hearing motions.

- b. The request failed to meet the legal tests for the granting of a stay.
- c. The request did not meet the requirements necessary to represent the official position of the ANC and is not entitled to "great weight".

On October 26, 1992, Advisory Neighborhood Commission 3B filed an official resolution requesting the Board to stay the issuance of its Modification Order pending a presentation by the applicant before the ANC to explain the nature of the proposal. The ANC further resolved that the requested stay is necessary so that the ANC may comment on all aspects of the proposal and the applicant's request for retroactive reaffirmation of all BZA orders dating back to 1968 and to have the ANC's judgment be given the "great weight" to which it is entitled by law.

Upon review of the request, responses thereto, and the record in the application, the Board concludes that the petition was not in proper form as required by its Rules and is, therefore, not properly before the Board. However, the Board chooses to waive its Rules in order to proceed to address the issues raised by the petition to stay.

The Board concludes that Ms. Sawaya has not met the burden of proof in demonstrating sufficient justification for the issuance of a stay. As stated by the D.C. Court of Appeals in Barry v. Washington Post Company, 529 A.2d 319, 320-321 (1987):

"To prevail on a Motion for Stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. In Re Antioch University, 418 A.2d 105, 109 (D.C. 1980), citing Virginia Petroleum Jobber's Association v. FPC, 104 U.S. App. D.C. 106, 110, 159 F.2d 921, 925 (1958). When the last three factors strongly favor interim relief, only a "substantial" showing of likelihood of success, not a "mathematical probability," is necessary for the Court to grant a stay. Washington Area Transit Commission v. Holiday Tours, Incorporated, 182 U.S. App. D.C. 220, 222, 559 F.2d 841, 843 (1977)."

Neither the request filed by Ms. Sawaya nor the resolution filed by the ANC proffered any argument whatsoever which would show cause to grant a stay. The only issues raised were related to whether service of the applicant's motion for modification of plans upon the parties to the case was proper and adequate. Prior to its decision on the motion for modification of plans, the Board determined that service upon the parties was proper and adequate

under the provisions of Section 3305 of its Rules. The applicant's submission indicated service by hand on all parties identified as such in the official record; where the record indicated a post office box as the address, service was made on the home address of the person named in the record. The record indicates that Ms. Sawaya was one of the two persons authorized by ANC 3B to present its report at the public hearing. The applicant's certificate of service indicates that both the ANC 3B and Ms. Sawaya were served with a copy of the motion for modification of plans. It is unclear why Ms. Sawaya did not personally receive her copy of the motion. However, the ANC was served by hand at the address of the person identified as its Chairperson at the time of the public hearing. The ANC has not asserted that it did not receive proper notice.

The Board's Rules provide for a ten-day period for parties to respond to a motion for modification of plans; the period between receipt of the motion and the Board's consideration of the motion and responses was twelve days. The Board concludes that the applicant made every effort to ensure proper service of its motion based on the information of record.

The Board hereby reiterates the fact that the request for modification of plans is limited to physical changes to the design originally approved by the Board and does not result in the need for additional zoning relief nor alter the material evidence upon which the Board based its decision. Moreover, the Board's decision in this application is limited to the evidence presented relative to the instant case and does not extend to prior applications approved or disapproved by this Board. Any previous decisions by the Board relative to the subject property would have been properly accompanied by an order setting forth relevant findings of fact and conclusions of law and the processing of applications for building permits and/or certificates of occupancy would have occurred in accordance with the written decision of the Board and can not be altered retroactively by action of this Board. Accordingly, the request for STAY of the issuance of the Board's ORDER approving the modification of plans is hereby DENIED.

MODIFICATION OF ORDER
DECISION DATE:

October 7, 1992

VOTE: 3-0 (Sheri M. Pruitt, Carrie L. Thornhill and Paula L. Jewell to approve; Angel F. Clarens not voting, not having heard the case).

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REQUEST FOR STAY

DECISION DATE: October 28, 1992

VOTE: 3-0 (Sheri M. Pruitt, Carrie L. Thornhill and Paula L. Jewell to deny; Angel F. Clarens not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:


MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: _____

NOV 10 1992

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

15434Order/bhs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



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As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on NOV 10 1992 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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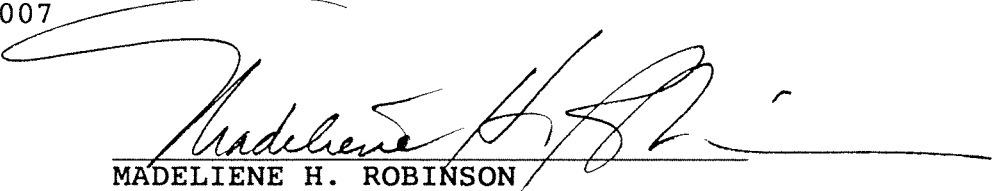
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NOV 10 1992

15434Att/bhs